



June 28, 2001

Ms. Paula A. Jones  
General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2001-2790

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code.<sup>1</sup> Your request was assigned ID# 148835.

The Employees Retirement System of Texas ("ERS") received three requests for the proposals that ERS received from prospective third-party administrators of the "TexaSaver" 401(k) and 457 deferred compensation plans. You inform this office that the responsive information was submitted to ERS by CitiStreet LLC ("CitiStreet"), Great-West Life and Annuity ("Great-West"), and Nationwide Retirement Solutions ("Nationwide"). ERS takes no position as to whether any of the requested information is excepted from public disclosure. ERS notified CitiStreet, Great-West, and Nationwide of the requests for information and of the parties' right to submit arguments to the attorney general as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under chapter 552 of the Government Code in certain circumstances).

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<sup>1</sup>You also request a ruling under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Chapter 552 of the Government Code does not authorize this office to issue a decision under FOIA.

Great-West submitted a letter to ERS, stating that Great-West does not object to the release of the information that Great-West submitted to ERS. Thus, ERS must release the requested information relating to Great-West.<sup>2</sup> Nationwide submitted no arguments within the time permitted by section 552.305(d), and we thus have no basis for a conclusion that any of the information submitted to ERS by Nationwide is excepted from disclosure. Therefore, ERS also must release the requested information relating to Nationwide.

CitiStreet submitted comments in which it argues that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is true here, the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private

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<sup>2</sup>We note that Great-West does not deem itself to have been a bidder or respondent to ERS's Request for Information and believes this to be an "important distinction." But as Great-West does not object to the release of the information relating to the TexSaver program that Great-West submitted to ERS, we do not consider whether this distinction makes any difference in this instance. We also note Great-West's statement to ERS that it "has no objection to the release of documents we submitted to ERS so long as our March 26, 2001 letter is attached." The documents relating to Great-West that ERS submitted to this office do not include such a letter.

person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> See Open Records Decision No. 552 at 5 (1990).

CitiStreet claims that seventeen portions of its proposal to ERS constitute trade secrets. We have considered CitiStreet's position and reviewed the information in question. We find, however, that CitiStreet does not demonstrate that any of this information qualifies as a trade secret under the criteria of section 757 of the Restatement of Torts. We therefore conclude that none of the information designated by CitiStreet may be withheld from disclosure under section 552.110(a).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

CitiStreet asserts that disclosure of the information for which it claims an exception under section 552.110(b)

would place CitiStreet at an enormous competitive disadvantage by disclosing the most critical aspect of its business-pricing model for the services at issue, its software and proprietary systems information, as well as reveal[ing] its clients and the names of its employees to competitors.

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<sup>3</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Having considered this argument, we find that CitiStreet has not made a sufficiently specific factual or evidentiary showing that the release of the information at issue would likely result in substantial competitive injury to CitiStreet. We thus conclude that the information is not excepted from disclosure under section 552.110(b). Therefore, ERS also must release the information relating to CitiStreet to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

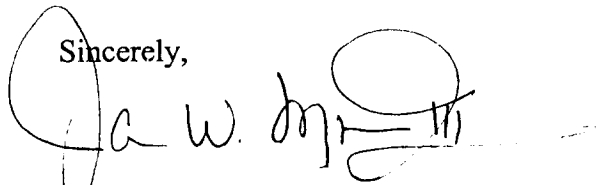
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is written in a cursive style with a large, looped initial "J" and a long horizontal stroke at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 148835

Enc. Marked documents

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